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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 SECURITIES AND EXCHANGE
11 COMMISSION,

12 Plaintiff,

13 v.

14 PATH AMERICA, LLC, et al.,

15 Defendants, and

16 POTALA SHORELINE, LLC, et al.,

17 Relief Defendants.

CASE NO. C15-1350JLR

ORDER

18 **I. INTRODUCTION**

19 Before the court is the Receiver Michael A. Grassmueck's motion for final
20 approval of the terms of a proposed restructuring transaction for the commercial
21 development project ("Tower Project") located at 2116 Fourth Avenue, Seattle,
22 Washington ("Land") submitted by Binjiang Tower Corp. ("Binjiang"), PH Seattle

1 Tower I, LLC (“Molasky”), and Defendant Lobsang Dargey and certain affiliated
2 companies. (Mot. (Dkt # 356).) The court has reviewed the motion and the responses of
3 (1) Mr. Dargey and Relief Defendants Dargey Development, LLC, Dargey Enterprises,
4 LLC, Path Othello, LLC, Path Farmer’s Market, LLC, and Dargey Holdings, LLC
5 (collectively, “Defendants”) (Def. Resp. (Dkt. # 365); (2) certain EB-5 investors in the
6 Tower Project (EB-5 Resp. (Dkt. # 366)); and (3) Plaintiff Securities and Exchange
7 Commission (“SEC”) (SEC Resp. (Dkt. # 367)). The court has also reviewed other
8 relevant portions of the record and the applicable law. Being fully advised, the court
9 GRANTS the motion with certain modifications as more fully described below.

10 **II. BACKGROUND**

11 The Receiver was appointed pursuant to the Order Appointing Receiver entered on
12 October 22, 2015. (Rec. Ord. (Dkt. # 88).) Pursuant to the terms of the Appointment
13 Order, the court took “exclusive jurisdiction and possession of the assets, of whatever
14 kind and wherever situated,” of the Receivership Entities, which assets include the Tower
15 Project and related interests (collectively, the “Tower Project Assets”). (*Id.* ¶ 2.) The
16 Appointment Order further authorized the Receiver to take immediate possession of all
17 real and personal property of the Receivership Entities, wherever located, and to engage
18 brokers to sell or dispose of these assets, “in the manner the Receiver deems most
19 beneficial to the Receivership Estate” without further order from the court, subject to
20 procedures that the court may establish to administer any planned disposition. (*Id.* ¶¶ 16-
21 17, 33-35.)
22

1 The Tower Project is a planned commercial development in downtown Seattle
2 intended to be a mixed-use facility comprised of residential apartment units, a hotel, and
3 other retail facilities. (6/23/16 Grassmuck Decl. (Dkt. # 357) ¶ 3.) The land for the
4 Tower Project development was acquired in 2013 by Tower LLC, whose members are
5 Dargey Holdings and Binjiang. (*Id.*)

6 Based on his review of the financial condition of the Tower Project, the Receiver
7 determined, in his reasonable business judgment, that completion of the development
8 would not be feasible absent a source of alternative funding, and that it would not be cost
9 effective or appropriate for him to attempt to raise equity in the market to complete the
10 development. (*See generally* 2/4/16 Mot. (Dkt. # 183).) Thus, on February 4, 2016, the
11 Receiver filed a motion recommending that the Tower Project Assets be sold out of
12 receivership, and sought authorization from the court to begin the process for marketing
13 the Tower Project for sale. (*Id.*) Following the submission of substantial further briefing
14 by interested parties and the Receiver regarding the Receiver's recommendation, and
15 after having conducted a hearing on April 18, 2016, the court entered an order on April
16 20, 2016, granting the Receiver's request to market the Tower Project Assets for sale.
17 (*See* 4/20/16 Order (Dkt. # 282).) The April 20, 2016, order directed the Receiver to
18 solicit proposals from prospective purchasers for both an "AS-IS, WHERE-IS" sale of
19 the Land, and proposals that contemplate a restructuring of the Tower Project where the
20 project would be completed in a manner consistent with EB-5 investors' goals. (*See*
21 *generally id.*)
22

1 After having solicited and evaluated a number of proposals, on May 13, 2016, the
2 Receiver filed a memorandum providing the court with his recommendations for the: (1)
3 best offer proposal for sale of the Land only; (2) the best proposal for restructuring of the
4 Tower Project; and (3) the best overall proposal. (5/13/16 Rec. Mem. (Dkt. # 303).) As
5 described in the Receiver's memorandum, the Receiver recommended the proposal
6 submitted by Binjiang and PH, LLC (a Molasky affiliate) to acquire the Tower Project
7 Assets for continued development of the Tower Project ("Binjiang/Molasky Proposal") as
8 the best overall proposal. (*Id.*)

9 Following further briefing by interested parties and the Receiver, and after
10 conducting a hearing on the matter on May 19, 2016, the court entered an Order on May
11 20, 2016 ("Preliminary Approval Order") approving the Receiver's recommendation to
12 select the Binjiang/Molasky Proposal. (Prelim. App. Order (Dkt. # 336).) The
13 Preliminary Approval Order further established relevant deadlines for final approval and
14 closing of the transaction contemplated by the Binjiang/Molasky Proposal (the
15 "Restructuring Transaction"). (*See id.*) Among these deadlines was a June 23, 2016,
16 deadline for the Receiver to submit this Motion for the court to consider and approve the
17 final terms of the Restructuring Transaction, including (i) the fully executed deal
18 documents memorializing the agreement between the parties, (ii) a form of proposed
19 notice to EB-5 investors of the Restructuring Transaction and their choice to opt-in or
20 opt-out of the transaction ("Notice to Investors"), and (iii) the method(s) by which the
21 Notice to Investors will be delivered. (*Id.*) The Preliminary Approval Order also
22 requires the Notice to Investors to be sent by no later than July 25, 2016 and investor

1 responses to be returned to the Receiver by no later than August 24, 2016, with the
2 Restructuring Transaction to close on or before August 31, 2016. (*Id.*)

3 **III. ANALYSIS**

4 **A. Legal Standard**

5 Federal courts have inherent equitable authority to issue a variety of ancillary
6 relief measures in actions brought by the SEC to enforce the federal securities laws. *SEC*
7 *v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980). “The power of a district court to impose
8 a receivership or grant other forms of ancillary relief does not in the first instance depend
9 on a statutory grant of power from the securities laws. Rather, the authority derives from
10 the inherent power of a court of equity to fashion effective relief.” *Id.* The “primary
11 purpose of equity receiverships is to promote orderly and efficient administration of the
12 estate by the district court for the benefit of creditors.” *SEC v. Hardy*, 803 F.2d 1034,
13 1038 (9th Cir. 1986).

14 District courts have the broad power of a court of equity to determine the
15 appropriate action in the administration and supervision of an equity receivership. *See*
16 *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005) (“[A] district court’s
17 power to supervise an equity receivership and to determine the appropriate action to be
18 taken in the administration of the receivership is extremely broad.”) (quoting *Hardy*, 803
19 F.2d at 1037); *see also CFTC v. Topworth Int’l, Ltd.*, 205 F.3d 1107, 1115 (9th Cir.
20 1999) (“This court affords ‘broad deference’ to the court’s supervisory role, and ‘we
21 generally uphold reasonable procedures instituted by the district court that serve th[e]
22 purpose’ of orderly and efficient administration of the receivership for the benefit of

creditors.”) (quoting *Hardy*, 803 F.2d at 1037-38). In the estate administration context, courts are deferential to the business judgment of bankruptcy trustees, receivers, and similar estate custodians. *See, e.g., Bennett v. Williams*, 892 F.2d 822, 824 (9th Cir. 1989); *Sw. Media, Inc. v. Rau*, 708 F.2d 419, 425 (9th Cir. 1983).

The court’s powers to administer the receivership and, specifically, to sell receivership assets, are not limited by the terms of private contracts. The court’s authority over the assets of a receivership estate derives from the court’s inherent power to exercise jurisdiction over assets taken into the receivership, rather than from underlying contracts. *SEC v. Am. Capital Invs., Inc.*, 98 F.3d 1133, 1143-45 (9th Cir. 1996), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83 (1998) (approving sale of property over limited partners’ objections based on court’s equitable powers, irrespective of state law or contract rights). Accordingly, the court has broad equitable powers and discretion to grant this motion and authorize and approve the terms of the Restructuring Transaction.

B. Defendants’ Response

Although Defendants take issue with some of the statements of the Receiver in his motion, they do not object to the proposed Restructuring Transaction. (Def. Resp. at 1.) Indeed, “Defendants join with the Receiver in moving the [c]ourt for the relief identified in the proposed Order Granting Final Approval of Disposition of Potala Tower Related Assets (ECF No. 356-1).” (*Id.*)

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1 **C. EB-5 Investors' Response**

2 A group of approximately 65 investors in the Tower Project whose funds remain
 3 invested ("EB-5 Investors") filed a response to the Receiver's motion. (*See* EB-5 Resp.
 4 at 1.) EB-5 Investors "generally support the Binjiang/Molasky Proposal and ask that the
 5 Receiver's [m]otion be granted." (*Id.* at 2.) EB-5 Investors, however, raise three
 6 concerns about the Restructuring Transaction, and the court addresses each in turn.

7 **1. Continued Pursuit of the USCIS Appeal**

8 EB-5 investors state that they believe that the Binjiang/Molasky Proposal or the
 9 proposed Restructuring Transaction "presents the best option" to maximize the potential
 10 that they will achieve the EB-5 immigration benefit they originally sought when investing
 11 in the Tower Project. (EB-5 Resp. at 3.) They ask the court, however, to "explicitly
 12 order Molasky to do everything in its power to give the appeal the best possible chance of
 13 succeeding." (*Id.*) They specifically ask the court to require Molasky to: (a) "diligently
 14 pursue the [United States Citizenship and Immigration Services ("USCIS")] appeal with
 15 the continued assistance of competent, experienced EB-5 counsel; (b) supplement the
 16 USCIS appeal as necessary with all documentation showing that the Tower Project is
 17 going forward in a manner consistent with its original business plan; and (c) pursue all
 18 other available avenues of appeal should the pending appeal be denied in the first
 19 instance." (*Id.*)

20 The Receiver responds that the existing Master Agreement, which has been agreed
 21 to and fully executed by the parties to the transaction, already includes terms that address
 22 EB-5 Investors' concerns. (Reply (Dkt. # 370) at 1.) Specifically, the Master Agreement

1 provides that Molasky would be “appointed to implement and execute the remaining
2 design and construction of the [Tower] Project in a manner consistent with the original
3 offering . . . as approved by the USCIS.” (Master Agreement (Dkt. # 357-2) at 23.) The
4 Master Agreement further provides that “Molasky, or its designee, shall be responsible
5 for continued prosecution of the Appeal after the Closing.” (*Id.* at 31.) Given these
6 terms, the Receiver believes, and the court agrees, that EB-5 Investors’ concerns are
7 adequately addressed by the terms of the Master Agreement and that no revisions to the
8 documents are necessary.

9 **2. Memorializing the Scope of the Opt-Out Release**

10 EB-5 Investors request that the terms of the release for EB-5 investors who choose
11 to opt-out of the Restructuring Transaction be further clarified in the form “Release of
12 Claims by EB-5 Investors.” (EB-5 Resp. at 5.) In particular, EB-5 investors request
13 clarification that: (1) the opting-out investors will retain a \$250,000.00 claim against the
14 Receivership estate, and (2) the release for opting-out investors will not include a waiver
15 of claims for consequential damages against the Receivership estate. (*Id.*)

16 The Receiver does not object to the requested clarifications. (Reply at 3.)
17 However, at the time he filed his reply memorandum, he had not yet obtained the parties’
18 agreement to the proposed language. (*Id.*) Given the time constraints, the Receiver
19 suggests that the following language be added to the end of paragraph 2 of the Proposed
20 Order (Dkt. # 356-1): “If and to the extent the Receiver, Binjiang, Molasky, and the
21 Dargey Parties agree in writing to revise the Notice to Investors (defined below) to
22 narrow the scope of the release attached thereto as Exhibit E, such revised Disclosure

1 Document is hereby APPROVED.” (Reply at 3.) The Receiver “believes that the
2 foregoing language provides the parties the opportunity to address the EB-5 Investors’
3 concern without delaying the [proposed Restructuring Transaction].” (*Id.*) The court
4 agrees and so orders the foregoing alteration.

5 **3. Addition of a “Reasonable Efforts” Substitution and Refund Provision**

6 EB-5 Investors propose adding a provision to the Master Agreement which
7 generally provides that if an individual investor’s immigration petition is denied for
8 reasons unrelated to the Tower Project’s EB-5 status, the project would use “reasonable
9 efforts” to find a substitute EB-5 investor and issue a refund of the denied investor’s
10 investment principle. (EB-5 Resp. at 4.) The Receiver takes no position on the substance
11 of EB-5 Investors’ request. (Reply at 2.) However, he has reservations regarding the
12 addition of such a term to the Restructuring Transaction during the final stages of this
13 complex transaction, because he believes that addition may “create unnecessary obstacles
14 to closing.” (*Id.*) He warns about the time and expense required to renegotiate and
15 document the terms of the provision and the uncertainty of future enforcement. (*Id.*)
16 Finally, he confirms that the other parties to the Restructuring Transaction have not
17 agreed to this request. (*Id.*)

18 Given the fact that EB-5 Investors are generally in favor of the Restructuring
19 Transaction, and that both they and the court believe it offers “them the best chance of
20 obtaining conditional permanent resident status” (*see* EB-5 Resp. at 2), the court is
21 unwilling to imperil the closing of the Restructuring Transaction over this request. If the
22 Restructuring Transaction fails to close, EB-5 Investors risk losing whatever chance the

1 Restructuring Transaction offers with respect to their immigration goals. Accordingly,
2 the court agrees with the Receiver that this request from EB-5 Investors should be denied,
3 and the court denies this request.

4 **D. The SEC's Response**

5 The SEC filed a response to the Receiver's motion stating that it "does not oppose
6 the Receiver's proposed disposition of the assets." (SEC Resp. at 1.) However, the SEC
7 objects "to [Mr.] Dargey's injection of himself into the transaction in order to secure
8 attorney's fees." (*Id.*) The SEC's position is that "[r]egardless whether the [c]ourt
9 determines to approve the Receiver's [m]otion, [Mr.] Dargey should be required to move
10 the [c]ourt and make a proper showing for the relief he seeks from the [c]ourt's freeze on
11 his assets." (*Id.*)

12 The court notes that without Mr. Dargey's and his attorneys' "injection" into the
13 transaction, any hope that EB-5 Investors had of fulfilling their EB-5 immigration goals
14 would have been permanently lost. Without Mr. Dargey's persistence, the Tower Project
15 would have been sold from the Receivership on an "AS IS, WHERE IS" basis. The court
16 is, of course, mindful of the SEC's allegations that it was Mr. Dargey's fraudulent
17 behavior that imperiled the EB-5 investors' immigration goals in the first place, as well
18 as the evidence the SEC has presented so far in support of those allegations.

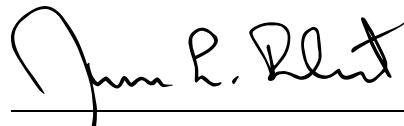
19 Nevertheless, at this point in the litigation, the SEC's allegations remain just that. The
20 SEC's claims against Mr. Dargey have not been proven in a court of law. Thus, Mr.
21 Dargey's willingness to voluntarily and without objection relinquish his asserted
22 ownership in the Tower Project represents a benefit to both the Receivership estate and to

1 EB-5 Investors who support the proposed Restructuring Transaction. There is no doubt
2 that Mr. Dargey will incur substantial legal fees in defending himself with respect to the
3 SEC's allegations. Further, the court is reassured that the funds at issue will be use
4 appropriately for legal expenses because the funds will be deposited into his attorney's
5 trust account and thus will not be placed directly under his control. Finally, neither the
6 Receiver, nor EB-5 Investors have objected to the fact that the Restructuring Transaction
7 provides for \$1.8 million to be set aside for payment of Mr. Dargey's legal fees. In light
8 of the foregoing, the court rejects the SEC's objection.

9 IV. CONCLUSION

10 Based on the foregoing analysis, the court GRANTS the Receiver's motion for
11 final approval of the disposition of the Potala Tower related assets, subject to the
12 alteration set forth in section III.C.2 above. The court will enter the Receiver's proposed
13 order (Dkt. # 356-1) with the alteration referenced in section III.C.2 above interlineated
14 therein.

15 Dated this 15th day of July, 2016.

17 

18 JAMES L. ROBART
19 United States District Judge